2005

The State of Utah v. Tamara Rhinehart : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20050553-CA
TAMARA RHINEHART,	:	
Defendant/Appellant	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS FOR BURGLARY, A SECOND DEGREE FELONY; AND THEFT, A SECOND DEGREE FELONY, IN THE FIRST JUDICIAL DISTRICT COURT, CACHE COUNTY, UTAH, THE HONORABLE GORDON J. LOW PRESIDING

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ORAL ARGUMENT NOT REQUESTED

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20050556-CA
TAMARA RHINEHART,	:	
Defendant/Appellant	:	

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BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS

Defendant appeals from convictions for burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (2003); and theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404 (2003), in the First Judicial District Court, Cache County, Utah, the Honorable Gordon J. Low presiding.

This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e)(West 2004).

STATEMENT OF THE ISSUE AND STANDARD OF APPELLATE REVIEW

Issue I: Was any preliminary hearing error cured by defendant's subsequent conviction by a jury beyond a reasonable doubt?

Standard of Review: "[A]n error at the preliminary state is cured if the defendant is later convicted beyond a reasonable doubt." *State v. Quas*, 837 P.2d 565, 566-67 (Utah App. 1992).

Issue II: Did the trial court abuse its discretion by allowing trial of the burglary and theft charges to go forward before trial on the murder charge?

Standard of Review: A trial court has considerable discretion to administer the business of its docket. An appellate court generally will not disturb the trial court's decision "unless the trial court abused its discretion." *Walker Drug Co., Inc. v. La Sal Oil Co.*, 972 P.2d 1238, 1244 (Utah 1998).

Issue III: Was it error to admit out-of-court statements not offered for the proof of the matter asserted?

Standard of Review: "A trial court has broad discretion to admit or exclude evidence and its determination typically will only be disturbed if it constitutes an abuse of discretion." *State v. Whittle*, 1999 UT 96, ¶ 20, 989 P.2d 52.

Issue IV: Should this Court reach defendant's inadequately briefed challenge to the denial of her motion for a new trial?

Standard of Review: Appellate courts "review the decision to grant or deny a motion for a new trial only for an abuse of discretion." *State v. Loose*, 2000 UT 11, ¶ 8, 994 P.2d 1237.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following items are contained in Addendum A:

Utah Rule of Evidence 1102 (West 2006)

Utah R. Civ. P. 40(a) (West 2006)

STATEMENT OF THE CASE

Defendant Tamara Rhinehart was originally charged with one count of communications fraud, a second degree felony; one count of burglary, a second degree felony; and one count of theft, a second degree felony (R1-2). In a second amended information, she was charged only with burglary and theft (R372-73). A preliminary hearing was held on February 5, 2004 (R16-20 and TP:1-172).[1] Defendant was subsequently bound-over for trial (R19-20 & 26-28).

Defendant filed a motion to quash the bindover (R31-33). On May 10, 2004, a hearing was held on that motion (R73-74).[2] The court denied the motion (*Id.* and R77-86). Defendant then filed a petition for interlocutory appeal, seeking to appeal the order denying her motion to quash the bindover (R101-121). The petition was denied (R146a).

The preliminary hearing included evidence as to the murder and as to the burglary and theft (TP:1-172). However, the charges were severed for trial. The burglary and theft case proceeded to trial before the murder case. Defendant filed an objection to order of trial

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[1] Defendant was also charged with aggravated murder in case no. 031100633. The preliminary hearing included evidence as to the murder case and the burglary and theft. The transcript of the preliminary hearing was filed under the murder case number. It does not contain any bate stamp numbers. Therefore, the State will refer to the transcript of the preliminary hearing as TP:page number. (E.g., TP:12).

[2] Defendant has failed to include a transcript of the hearing on the motion to quash the bindover as part of the record in this case.

(R358-362). She asserted that the Court should require the trial of the murder case first (R358). The court denied the defense objection (R424 and T1:6-7).[3]

On January 13, 2005, the jury found defendant guilty of burglary and theft (R431). On February 24, 2005, defendant was sentenced to an indeterminate term of not less than one year nor more than fifteen years on each count. The prison term was then suspended on certain conditions (R438-440).[4] On March 4, 2005, defendant filed a motion for new trial (R441-443, 454-456). On March 22, 2005, defendant filed a notice of appeal (case no. 20050278) (R502-504).[5] On May 10, 2005, the trial court denied the motion for new trial (R527-530). On May 16, 2005, defendant filed a new timely notice of appeal (case no. 20050553 (R531-532).

STATEMENT OF THE FACTS

Only family members knew

Defendant is the niece of the victim, Sue Anne Davis (T1:103-04). Ms. Davis lived in the basement apartment of a house where her sister lived upstairs (T1:104, 106). Her apartment could be reached by coming down the stairs from her sister's house (T1:109-10). The sister kept a spare set of house keys outside in a magnetic box inside a metal trash can

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[3] Three volumes of trial transcripts have been included as part of the record. However, they do not contain any bate stamp numbers. Therefore, the State will refer to the three volumes of trial transcripts as T1, T2, and T3, and will reference page numbers within the transcripts as T1:page number. (E.g., T1:12).

[4] An amended sentence was filed on April 28, 2005 (R525-26).

[5] The appeal in case no. 20050278 was dismissed as untimely. *See* Utah R. App. P. 4(e).

(T1:110). Other family members knew about those keys (T1:110). In the summer of 2003, Ms. Davis had a small safe stolen from her apartment (T1:104-05). She kept the safe under the stairway in a storage closet (T1:106).

On June 5, 2003, Ms. Davis went on a trip to Montana to visit her daughter and grandchildren, and she was gone until June 15, 2003 (T1:105). The last time she saw the safe was when she took a small amount of cash out of it shortly before leaving for Montana (T1:105). Before she left for Montana, there was at least $6,500.00 in the safe (T1:106).

Sometime after her return from Montana, she began planning another trip. She went to get some cash from her safe, but the safe was nowhere to be found (T1:112). She searched for the safe by emptying the closet. She even had her daughter come and help her search the apartment, but they could not find the safe (T1:112). When Ms. Davis realized that the safe was gone, she checked, but saw no signs of a break-in (T1:112). Family members were the only people who knew where her safe was kept (T1:113-14).

Defendant knew the layout of her aunt's basement apartment very well, because she had lived there herself at one time (T1:114).

Telling her hairdresser

Defendant was a client of Marnie Christianson, who did defendant's hair and gave her manicures and pedicures (T2:42-43). At one point in 2003, defendant called and cancelled an appointment with Ms. Christianson. Defendant told Ms. Christianson that she couldn't have her hair and toes done because she had no money (T2:44). Within a few days, defendant called and made another appointment (T2:44). When defendant came in for the

new appointment, Ms. Christianson asked defendant if she had received child support and alimony from her "ex." (T2:45). Defendant told her that she had gotten the money from a safe she had stolen (T2:45).

Defendant told Ms. Christianson that she had gotten the people out of the house, while her boyfriend, Craig Nicholls, went in and stole the safe (T2:46). She also said that they had opened the safe with a screw driver or a hammer and then dumped it in a parking lot in Clearfield. Defendant told Ms. Christianson that there was $5,000 in the safe and that they had split the money (T2:46). Ms. Christianson eventually reported this conversation to the police (T2:47).

Just like "The Italian Job"

Jessica Goalen was a nanny for defendant for about six months in 2002 and 2003 (T2:56). At one point, defendant laid out her finances, and Ms. Goalen tried to make a budget for her, because Goalen couldn't understand how defendant was making it on so little money (T2:57). So Ms. Goalen knew how defendant was doing financially (T2:57).

Ms. Goalen and defendant went to see a lot of movies (T2:58). One of the movies they saw together was called "The Italian Job." (T2:58). "The Italian Job" was about a gang of thieves stealing a safe somewhere in Europe (T2:59). Sometime after seeing the movie, defendant told Ms. Goalen that she had gotten some money (T2:58-59). Defendant said it was "just like 'The Italian Job'" and that it was "really slick. In and out." (T2:59). Defendant told Ms. Goalen that she drove back and picked up her boyfriend, Craig Nicholls, after he took the safe (T2:61, 63). She told Ms. Goalen that they cracked open the safe and

then threw it away in a field by her home. She also said there was $5,000.00 that she and Craig Nicholls divided between themselves (T2:61, 63).

Craig Nicholls

On November 12, 2003, police detective Shawn Bennett talked to Craig Nicholls about the burglary (T2:71, 73). Craig Nicholls told police that he and defendant planned that he would go into the home of defendant's aunt, who had a safe with some money in it. Under the plan, Nicholls would go into the home and take the safe while defendant took her aunt out to lunch or dinner (T2:20-22).

SUMMARY OF THE ARGUMENT

This Court should affirm defendant's conviction because any error at the preliminary hearing was cured when defendant was convicted beyond a reasonable doubt. In addition, defendant's confrontation rights were not violated because *Crawford v. Washington* does not apply to a preliminary hearing. Defendant has not established that the trial court erred in denying her motion to quash the bindover.

Defendant has not shown that the trial court abused its discretion by allowing prosecution of the burglary and theft charges prior to the murder charge.

The trial court did not abuse its discretion in admitting evidence which the defendant objected to as hearsay, because the trial court correctly determined that defendant had "opened the door," and the statements were not hearsay.

Finally, defendant has not shown that the trial court erred in denying the motion for new trial. Indeed, her brief is wholly inadequate as to this issue.

ARGUMENT

I. DEFENDANT IS NOT ENTITLED TO APPELLATE RELIEF BASED ON HER CLAIM THAT THE TRIAL COURT IMPROPERLY DENIED HER MOTION TO QUASH THE BINDOVER.

In the trial court, defendant filed a motion to quash the bindover, alleging that evidence was impermissibly admitted at the preliminary hearing (R31). Defendant alleged that hearsay evidence was admitted during the preliminary hearing in violation of her constitutional right to confront and cross examine witnesses (R37). Defendant argued that *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004) applied to the preliminary hearing (R41). Defendant alternatively argued that if *Crawford* did not apply, the hearsay still should not have been admitted at the preliminary hearing, because it was unreliable (R41).

Defendant raises these same arguments on appeal. She argues that the bindover order was based only on non-confronted hearsay (def.'s br. at 8). She also argues that she was denied her constitutional right to confront and cross examine witnesses at the preliminary hearing, and that *Crawford* applied at the preliminary hearing (def.'s br. at 9-11). Finally, defendant also argues that the hearsay was inherently unreliable (def.'s br. at 12-14).

A. Any error at the preliminary hearing was cured by the subsequent conviction.

Even if hearsay were improperly admitted at the preliminary hearing, defendant is not entitled to relief on appeal because any error was cured by the subsequent conviction. "Because a bindover determination requires less evidence than a conviction, there is an

inference that any flaw in a bindover determination is necessarily cured if the defendant is later convicted beyond a reasonable doubt." *State v. Winfield*, 2006 UT 4, ¶ 26, 128 P.3d 1171 (internal quotes and citations omitted); *State v. Quas*, 837 P.2d 565, 566-67 (Utah App. 1992) ("an error at the preliminary stage is cured if the defendant is later convicted beyond a reasonable doubt.").

In any event, defendant cannot prevail on her claim because the Confrontation Clause does not apply to preliminary hearings.

B. Background - the Supreme Court's *Crawford* decision.

The State of Washington charged Crawford with assault and attempted murder. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1357 (2004). The State sought to introduce as evidence a recorded statement that Crawford's wife, Sylvia, had made during police interrogation. *Id.* at 1358. Sylvia did not testify at trial because of Washington's marital privilege. *Id.* at 1357. Crawford objected to the use of her pre-trial statement at trial, arguing that he had a Sixth Amendment right to confront the witnesses against him. *Id.* at 1358. The trial court admitted the statement, reasoning that it had adequate indicia of reliability. *Id.* Crawford was convicted, and the state supreme court affirmed. *Id.*

The United States Supreme Court reversed. *Id.* at 1374. The Supreme Court held that Washington's use of Sylvia's statement at trial violated the Confrontation Clause. *Id.* The Court held that Sylvia's statement was testimonial hearsay and was inadmissible where Sylvia could not be cross-examined at trial and where Crawford had not had a prior opportunity to cross-examine her about the statement. *Id.*

In reaching its result, the Court set forth the following rule: where a witness has given pre-trial testimonial evidence against a defendant but is unavailable for cross-examination at trial, that evidence is not admissible at trial unless the defendant had a prior opportunity to cross-examine. *Id.* The Court reasoned, "[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 1365. "Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374.

The Court made clear that its ruling applies only where declarants are not present at trial for cross-examination. The Confrontation "Clause does not bar admission of a statement so long as the declarant is present at trial to defend and explain it." *Id.* at 1369. In fact, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.*

C. The Confrontation Clause does not preclude the use of hearsay evidence at preliminary hearings.

The right to confrontation is a trial right. The Confrontation Clause does not apply to preliminary hearings. Thus, the "United States Supreme Court has held that the protections afforded criminal defendants by the Confrontation Clause do not extend to preliminary hearings." *State v. Pledger*, 896 P.2d 1226, 1229 n.4 (1995) (citing *Gerstein v. Pugh*, 420 U.S. 103, 120-22, 95 S.Ct. 854, 866-67). The United States Supreme Court "has

long held that cross-examination at a preliminary hearing is not required by the confrontation clause of the Sixth Amendment." 4 Wayne R. LaFave, et al., *Criminal Procedure* § 14.4(c) (2d ed. 1999) (citing *Goldsby v. United States*, 160 U.S. 70 (1895)).

Crawford v. Washington does not change that rule. *Crawford* addresses the use of testimonial hearsay *at trial*. The case holds that the Confrontation Clause prohibits the use of testimonial hearsay *at trial* unless the declarant is present at trial or unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine. 124 S.Ct. at 1369 & n.9. No where does *Crawford* suggest that the Confrontation Clause applies to preliminary hearings, or that the Court intended to overrule the authorities cited above.

Nor does the Utah Constitution prohibit the use of testimonial hearsay at a preliminary hearing. In arguing that a defendant has a right to confront and cross-examine witnesses at a preliminary hearing, defendant cites *State v. Anderson*, 612 P.2d 778 (Utah 1980) (def.'s br. at 10). The Utah Constitution, however, was amended in 1994 and now expressly provides for the admission of hearsay testimony at preliminary hearings:

> Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause . . . .

Utah Const. art. I, § 12. Thus, *Anderson*'s prohibition on the use of hearsay testimony during a preliminary hearing no longer applies.

D. The hearsay admitted at the preliminary hearing was reliable.

Defendant argues that even if *Crawford* does not apply to preliminary hearings, it was still error because the hearsay admitted at the preliminary hearing was inherently unreliable (def.'s br. at 12-14). Defendant is mistaken. The evidence met the definition for reliable hearsay under rule 1102, Utah Rules of Evidence.

Like the Utah Constitution, rule 1102 specifically provides that reliable hearsay is admissible at criminal preliminary examinations. Reliable hearsay includes "a statement of a declarant that is written, recorded, or transcribed verbatim which is ... under oath or affirmation ... or pursuant to a notification to the declarant that a false statement made therein is punishable." Utah R. Evid. 1102(b)(8)(A) & (B).

In its order denying the defendant's motion to quash the bindover, the trial court said:

> 1. The hearsay evidence, presented during the preliminary hearing held in the above entitled matter, was properly admitted pursuant to Article I section 12 of the Utah Constitution and Rule 1102 of the Utah Rule of Evidence.
>
> 2. The hearsay evidence submitted by the State in each instance qualified under Rule 1102(b)(8), (9) of the Utah Rules of Evidence as it was either a written, recorded, or transcribed statement, given under oath or affirmation; or was given pursuant to a notification to the declarant that a false statement made therein is punishable; or the statement had other indicia of reliability.
>
> 3. The same right to confront and cross examine a witness that is provided for in a criminal trial does not exist in a preliminary hearing. The case of *Crawford v. Washington*, 2004 WL 413301 applies to trial proceedings and does [not] extend the same rights of confrontation and cross examination to a preliminary hearing.

(R84).

At the preliminary hearing, the court admitted the transcript of Craig Nicholls's interview with the police (State's Exhibit #25), Ms. Christianson's statement (State's Exhibit #29), and a written statement by the victim, Ms. Davis (R80-81).[6] As defendant admits, Mr. Nicholls's statement was recorded by a registered professional reporter (def.'s br. at 5-6). In each instance, the witness statements were given under oath or affirmation or the proper admonishment of criminal prosecution (R63, 80-83). The court properly admitted these statements under rule 1102. In its order denying defendant's motion to quash, the court specifically stated that "[a]ll of the testimony from the witnesses demonstrated a reliability and corroboration of the other hearsay statements received consistent with Rule 1102." (R82-83). Thus, the hearsay was properly admitted.

E. Defendant has failed to state a claim based on newly discovered evidence.

In her argument section of the brief, defendant includes a claim titled "Newly Discovered Evidence." (def.'s br. at 14). However, defendant never identifies any newly discovered evidence. She also fails to ever state an actual issue related to newly discovered evidence. The State cannot respond, because no issue is presented, and the State cannot determine what defendant is attempting to argue. This claim is deficient. *See* argument IV below. This section of the brief clearly does not comply with rule 24, Utah Rules of Appellate Procedure, and should therefore be stricken.

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[6] According to the trial court's order denying defendant's motion to quash the bindover, defendant did not object to admission of the sworn witness statement of Sue Davis at the preliminary hearing (R80-81).

II. THE TRIAL COURT DID NOT ERR IN ALLOWING PROSECUTION OF THE BURGLARY AND THEFT CHARGES PRIOR TO THE HOMICIDE CHARGE.

Defendant filed an objection to the order of trial, asserting that the trial court should require trial of the homicide case first, before trial of the burglary and theft case (R358-362). The trial court denied defendant's objection (R424 & T1:6-7). On appeal, defendant argues that the decision of the trial court that prosecution could proceed first on the burglary and theft case, "constituted a substantial error and was prejudicial to the Defendant." (def.'s br. at 16). Defendant argues that the order of the trials was unfairly prejudicial because she was "unable to fully cross-examine witness, [sic] nor testify on her behalf because of her fear of incriminating herself in the pending murder case." (def.'s br. at 17).

Defendant may have chosen not to testify on her own behalf in this case, and also may have chosen to limit cross-examination of certain witnesses in order not to incriminate herself in the pending murder case. However, this circumstance does not establish that the defendant was unfairly prejudiced. It also does not establish that the trial court abused its discretion by allowing prosecution of the burglary and theft case prior to the murder case.

A defendant has no right to dictate to the court which of her felony charges should go to trial first. Defendant cites no case law or any other authority for her position that it was error to proceed with the burglary and theft trial before the murder trial. Rule 40, Utah Rules of Civil Procedure addresses the assignment of cases for trial. It provides:

> (a) Order and Precedence. The district court shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other

manner as the courts may deem expedient. Precedence shall be given to actions entitled thereto by statute.

Utah R. Civ. P. 40(a) (West 2006).[7]

"Rule 42(b) of the Utah Rules of Civil Procedure gives the trial court 'considerable discretion' to administer the business of its docket and determine how a trial should be conducted." *Walker Drug Co., Inc. v. LaSal Oil Co.*, 972 P.2d 1238, 1244 (Utah 1998). In addition, under the Rules of Criminal Procedure, "[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or statutes." Utah R. Crim. P. 31(2) (West 2006).

Defendant alleges that she was unable to fully cross-examine witnesses, or testify on her behalf because of her fear of incriminating herself in the pending murder case (def.'s br. at 17). However, defendant was not prevented from fully cross-examining any witness and was also not prevented from testifying on her own behalf. Defendant simply had to choose whether to testify and what to ask witnesses.

Requiring a defendant to choose between two options is not unconstitutional. In *State v. Gentry*, 747 P.2d 1032 (Utah 1987), the trial court denied defendant's motion to suppress his prior convictions. The defendant claimed that he was "forced" to choose between taking the stand to tell his story, and being impeached by prior convictions. *Id.* at 1036. The Utah

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[7] In addition, under Utah Rule of Criminal Procedure 17(b):

(b) Cases shall be set on the trial calendar to be tried in the following order:
(1) misdemeanor cases when defendant is in custody;
(2) felony cases when defendant is in custody;
(3) felony cases when defendant is on bail or recognizance; and
(4) misdemeanor cases when defendant is on bail or recognizance.

Supreme Court rejected defendant's argument. "The Constitution affords an accused a choice: He may refuse to become a witness, or he may elect to take the witness stand and testify in his own behalf." *Gentry*, 747 P.2d at 1036. Once he exercises his constitutional right not to testify, "he cannot now be heard to complain that the court forced the choice upon him and thereby denied him due process." *Id.*

Similarly, the Utah Supreme Court has held that "requiring a defendant to 'choose between waiver [of counsel] and another course of action as long as the choice presented to him is not constitutionally offensive' is perfectly permissible." *State v. Hassan*, 2004 UT 99, ¶26, 108 P.3d 695 (citing *State v. Bakalov*, 1999 UT 45 at ¶ 17, 979 P.2d 799); *see also State v. Vancleave*, 2001 UT App 228, 29 P.3d 680.

In this case, defendant had the choice to testify or not. She also had the choice to cross-examine witnesses or not. The choices presented to defendant were perfectly permissible. She was not denied the right to testify or cross-examine witnesses. She simply did not like the choices presented to her. The fact that she did not like her choices does not establish that the trial court abused its discretion in denying her objection to the order of the trials. Defendant has failed to establish that the trial court abused its discretion by denying her objection to the order of trial. She therefore is not entitled to appellate relief.

III. THE TRIAL COURT PROPERLY ADMITTED TESTIMONY AT TRIAL BECAUSE DEFENDANT HAD "OPENED THE DOOR" TO THE ISSUE, AND THE EVIDENCE WAS NON-HEARSAY.

Defendant argues that despite objections from the defense, the trial court allowed hearsay to be introduced during the trial (def.'s br. at 18). The issue was whether the defense

had "opened the door" to the testimony by questioning Detective Bennett on the subject of whether he had verified the existence of the safe. *Id.*

During trial, defense counsel cross-examined Detective Bennett. The following exchange occurred:

> **Q.** You didn't ask her [the victim] whether there was anyone else who had any knowledge of whether a safe ever existed?
> **A.** Not to my knowledge.
> **Q.** You never determined that there is another person on this planet that ever saw a safe in the possession of Sue Davis, correct?
> **A.** Correct.

(T2:17-18).

On re-direct, the prosecutor asked the detective who he had spoken to about the safe (T2:19-20). An unreported sidebar conference was held (T2:20). The prosecutor then asked the detective what Craig Nicholls said about the safe (T2:20). Defense counsel made a hearsay objection, but the objection was overruled (T2:21). The prosecutor also asked what Jessica Goalen said about the safe (T2:22). Defense counsel again made a hearsay objection, but the detective was allowed to answer (T2:22-23).

Later, information was put on the record that a discussion was held as to whether or not it would be appropriate for the prosecutor to elicit hearsay statements about the existence of the safe, based on the argument that the door had been opened by the defense (T2:26-27). Defendant objected. *Id.* The trial judge said: "The line of questioning was whether or not there was any intrinsic evidence of the existence of the safe at all among anybody, not just family members. So the door was sufficiently opened to allow the state to proceed with

proof as to the existence of the same other than the victim's statement. So that was the basis for the ruling." (T2:28).

It is appropriate for a party to elicit testimony that may otherwise not have been admissible, when the opposing party "opened the door" to the issue. *State v. Houskeeper*, 2002 UT 118, ¶ 28, 62 P.3d 444, 451. "A party cannot introduce potentially inflammatory evidence and then later complain when the opposing party attempts to rebut it." *State v. Mahi*, 2005 UT App 494, ¶ 17, 125 P.3d 103, 107. Once a party has "opened the door" to evidence in cross-examination, "'[i]t is proper to allow ... any testimony which would tend to dispute, explain or minimize the effect of evidence that has been given by one's opponent.'" *State v. Harper*, 2006 UT App 178, ¶ 18,551 Utah Adv. Rep 8.

Defendant argues that even if the defense had "opened the door," the detective still should not have been allowed to testify about the hearsay statements, but witnesses should have been called to testify as to the existence of the safe (def.'s br. at 19). Defendant is mistaken. The question was not whether anyone else knew about the safe, the question defense counsel posed was whether the detective had ever determined that "another person on this planet [] ever saw a safe in the possession of Sue Davis." (T2:17-18). Therefore, once the door had been opened, it was appropriate for the prosecution to ask and the detective to answer concerning those he had spoken to about the safe.

But more important, the statements elicited from the detective were not hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Utah R. Evid.

801(c). The statements elicited from the detective as to what Craig Nicholls and Jessica Goalen said about the safe were not hearsay, because they were not offered to prove the truth of the matter asserted. They were not offered to prove that what Craig Nicholls and Jessica Goalen said about the safe was true. They were offered to establish that the detective had verification that others knew about the existence of the safe.

If an out-of-court statement is offered simply to prove that it was made, without regard to whether it is true, such testimony is not proscribed by the hearsay rule. *State v. Haltom*, 2005 UT App 348, ¶ 13, 121 P.3d 42; *and see Salt Lake City v. Alires*, 2000 UT App 244, ¶ 27, 9 P.3d 769; *State v. Eberwein*, 2001 UT App 71, ¶ 13, 21 P.3d 1139; *State v. Loose*, 2000 UT 11, ¶ 10, 994 P.2d 1237.

The district court correctly determined that the door had been opened. It therefore properly denied defendant's objection, and admitted the testimony. "A trial court has broad discretion to admit or exclude evidence and its determination typically will only be disturbed if it constitutes an abuse of discretion." *State v. Whittle*, 1999 UT 96, ¶ 20, 989 P.2d 52. Defendant has failed to establish that the trial court abused its discretion. She is therefore not entitled to appellate relief.

Defendant also argues that "[w]ithout the hearsay statements, there would be no evidence of any burglary, and as a result no burglary case." (def.'s br. at 19). This argument is both unsupported and insupportable. The victim testified about owning the safe, how much money was in the safe, who knew about the safe, and when she discovered that the safe was missing. Other witnesses testified about statements the defendant herself made to them

about stealing the safe. Those statements were nonhearsy under rule 801(d)(2), Utah R. Evid. Even if it were error to allow the detective to testify about the statements others made to him about the safe, it was harmless.

"An error is harmless when it is 'sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings.'" *State v. Loose*, 2000 UT 11, ¶ 10, n.1, 994 P.2d 1237 (citing *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992)) (other citations omitted). An appellate court will not reverse a trial court for committing harmless error. *Id.*

IV. DEFENDANT HAS INADEQUATELY BRIEFED HER CLAIM THAT THE TRIAL COURT IMPROPERLY DENIED HER MOTION FOR A NEW TRIAL.

On appeal, defendant asserts that this "Court should review the trial court's decision to deny the Defendant's motion for a new trial." (def.'s br. at 3). However, defendant then makes no argument concerning this issue. This issue is omitted from the body of her brief. In her conclusion, defendant states that the "trial court erred in their [sic] denial to grant the Defendant's motion for a new trial. The admission of the hearsay statements, the order of the trials, and the admission of new evidence prejudiced the Defendant, and denied her of her rights to a fair trial." (def.'s br. at 21). Although defendant makes no argument about this issue in her brief, according to her conclusion, she is apparently attempting to claim that based on her other arguments, the trial court erred by denying the motion for new trial.

Defendant's brief is deficient. Defendant has failed to challenge the decision of the district court to deny the motion for new trial. She has not argued or established that any of

the court's findings were clearly erroneous, or that its conclusions of law were incorrect. Rather than provide meaningful legal analysis, defendant merely asserts that she is entitled to relief. This does not conform to the requirements of the briefing rule.

Rule 24 (a)(9), Utah Rules of Appellate Procedure, requires an appellant to include his "contentions and reasons . . . with respect to the issues presented," including "citations to the authorities, statutes and parts of the record relied on." This Court should not address issues inadequately briefed under this rule. *See State v. Gamblin*, 2000 UT 44, ¶ 6, 1 P.3d 1108 (refusing to consider argument which is inadequately briefed); *MacKay v. Hardy*, 973 P.2d 941, 947-48 (Utah 1998).

Utah courts have consistently held that issues not properly briefed should not be addressed on appeal. *See State v. Wareham*, 772 P.2d 960, 966 (Utah 1989). "'A reviewing court is entitled to have the issues clearly defined with pertinent authority cited.'" *State v. Snyder*, 932 P.2d 120, 130 (Utah App. 1997) (citing *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)).

Defendant's brief does not identify any specific error by the district court. It does not cite to the record; nor does it cite applicable authority. It also does not provide any meaningful legal analysis. *See State v. Price*, 827 P.2d 247 (Utah App. 1992); *Phillips v. Hatfield*, 904 P.2d 1108 (Utah App. 1995).

Defendant's brief also fails to make clear assertions, leaving the State, and this Court, the task of divining her position. *MacKay*, 973 P.2d at 948-49 (rejecting appellee's and cross-appellant's claim for failure to make clear assertions or to engage in even a "modicum

of analysis" where appellee merely "quote[d] or paraphrase[d] the record at great length, leaving [the] court with the task of attempting to divine [appellee's] position").

Defendant nowhere provides an analytical basis for her claim that the trial court erred by denying the motion for new trial. *See* Utah R. App. P. 24(a)(9) (providing that argument section of appellant's brief must "contain the contentions and reasons of the appellant with respect to the issues presented . . . with citations to the authorities, statutes, and parts of the record relied on"); *see also State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) (holding that "rule 24(a)(9) requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority"); *State v. Wareham*, 772 P.2d 960, 966 (Utah 1989) (holding that brief "must contain some support for each contention").

In sum, this Court is not "'a depository in which the appealing party may dump the burden of argument and research.'" *State v. Jaeger*, 973 P.2d 404, 410 (Utah 1999) (quoting *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)); *see also Thomas*, 961 P.2d at 305. Accordingly, defendant's claim should be rejected. *See Jaeger*, 973 P.2d at 410 (refusing to consider appellant's claim due to the lack of meaningful analysis of cited authority); *Wareham*, 772 P.2d at 966 (refusing to address claim on appeal where brief "wholly [lacked] legal analysis and authority to support his argument"); *State v. Bryant*, 965 P.2d 539, 548-49 (Utah App. 1998) (same); *State v. Yates*, 834 P.2d 599, 602 (Utah App. 1992) (same).

CONCLUSION

Defendant's convictions and sentences should be affirmed.

RESPECTFULLY SUBMITTED this 10th day of July, 2006.

MARK L. SHURTLEFF
ATTORNEY GENERAL

Erin Riley

ERIN RILEY
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of July, 2006, I mailed, postage prepaid, two accurate copies of the foregoing Plaintiff/Appellee's Brief to:

David M. Perry
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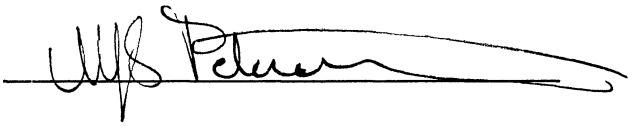

Addendum A

Utah Rules of Evidence, Rule **1102**

C
West's Utah Court Rules Annotated Currentness
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article XI. Miscellaneous Rules

→**RULE 1102.** RELIABLE HEARSAY IN CRIMINAL PRELIMINARY EXAMINATIONS

(a) Statement of the Rule. Reliable hearsay is admissible at criminal preliminary examinations.

(b) Definition of Reliable Hearsay. For purposes of criminal preliminary examinations only, reliable hearsay includes:

(1) hearsay evidence admissible at trial under the Utah Rules of Evidence;

(2) hearsay evidence admissible at trial under Rule 804 of the Utah Rules of Evidence, regardless of the availability of the declarant at the preliminary examination;

(3) evidence establishing the foundation for or the authenticity of any exhibit;

(4) scientific, laboratory, or forensic reports and records;

(5) medical and autopsy reports and records;

(6) a statement of a non-testifying peace officer to a testifying peace officer;

(7) a statement made by a child victim of physical abuse or a sexual offense which is promptly reported by the child victim and recorded in accordance with Rule 15.5 of the Utah Rules of Criminal Procedure;

(8) a statement of a declarant that is written, recorded, or transcribed verbatim which is:

(A) under oath or affirmation; or

(B) pursuant to a notification to the declarant that a false statement made therein is punishable.

(9) other hearsay evidence with similar indicia of reliability, regardless of admissibility at trial under Rules 803 and 804 of the Utah Rules of Evidence.

(c) Continuance for Production of Additional Evidence. If hearsay evidence is proffered or admitted in the preliminary examination, a continuance of the hearing may be granted for the purpose of furnishing additional evidence if:

(1) The magistrate finds that the hearsay evidence proffered or admitted is not sufficient and additional evidence is necessary for a bindover; or

(2) The defense establishes that it would be so substantially and unfairly disadvantaged by the use of the hearsay

evidence as to outweigh the interests of the declarant and the efficient administration of justice.

[Adopted effective April 1, 1999.]

ADVISORY COMMITTEE NOTE

Rule **1102** applies only in criminal preliminary examinations, and implements language added by amendment to Article I, section 12 of the Utah Constitution, effective July 1, 1995:

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Discovery is allowed under Rule 16, Utah Rules of Criminal Procedure, as well as by case law and other statutes.

Accordingly, paragraph (a) provides for admissibility of "reliable hearsay" evidence in criminal preliminary examinations (commonly called "preliminary hearings"). To the extent that *State v. Anderson,* 612 P.2d 778 (Utah 1980), prohibited the use of hearsay evidence at preliminary examinations, that case has been abrogated.

Paragraph (b) defines "reliable hearsay" in subparagraphs (1) through (8). Evidence which is admissible under any other law or rule of evidence is not rendered inadmissible by anything in paragraph (b).

Subparagraph (b)(2) specifically incorporates hearsay that would be admissible under U.R.E. 804 but eliminates the foundational element of unavailability.

Subparagraph (b)(3) permits the admission of exhibits in preliminary hearings even though the necessary foundation for admissibility is by hearsay only. For example, proving the chain of custody for controlled substances may be accomplished under this section without calling the witnesses in the chain.

Subparagraphs (b)(4) and (b)(5) permit the specified types of reports and records to be admitted without the testimony of the person who prepared the report or record or the custodian of the record. If there is special reason for exploring foundation or authenticity, subparagraph (c) gives the magistrate power to require additional evidence after a continuance.

Subparagraph (b)(6) is similar to the "fellow officer" rule applicable to search or arrest warrant affidavits as providing sufficiently "reliable" evidence.

Subparagraph (b)(7) requires that a child victim's hearsay report be close in time to the event reported and that it be recorded in compliance with the conditions prescribed in Utah Rules of Criminal Procedure 15.5(1)(a) through (d). This subparagraph does not necessitate a hearing under Utah Rules of Criminal Procedure 15.5 (1)(e) through (h) as a prerequisite to admission at a preliminary examination.

Under subparagraph (b)(8), written, recorded, or transcribed testimony of non-testifying witnesses is admissible if it is sworn, affirmed, or given under notification that false statements are prosecutable. The potential for prosecution under perjury or other criminal provisions tends to ensure the reliability of such testimony.

Subparagraph (b)(9) provides catchall admissibility for other forms of hearsay of similar reliability, not unlike U.R.E. Rules 803(24) and 804(5) provide under existing hearsay exceptions. Unlike U.R.E. Rules 803(24) and 804(5), there is no requirement that advance notice be given to the adverse party of evidence offered under

subparagraph (b)(9). If there is special reason for exploring foundation or authenticity, subparagraph (c) gives the magistrate power to require additional evidence after a continuance.

Paragraph (c) provides for continuances in the preliminary examination to enable a party to provide live witnesses or a more reliable form of hearsay where a party is substantially disadvantaged by the admission or exclusion of hearsay evidence proffered under this rule.

Under subparagraph (c)(1), the prosecution can get a continuance where hearsay evidence is not admitted and would be necessary to get the case bound over.

Under subparagraph (c)(2), a defendant may obtain a continuance by demonstrating that he is substantially and unfairly disadvantaged by a particular proffer of evidence that would be otherwise admissible under the rule and the disadvantage outweighs the interests of the witness and the efficient administration of justice. In making a decision as to whether the defendant is substantially and unfairly disadvantaged by the use of reliable hearsay evidence, a magistrate may, among other factors, take into consideration the limitations on discovery available to the defendant.

Either party is at liberty to subpoena and call any live witnesses whose testimony would be germane to the determination of probable cause.

LIBRARY REFERENCES

Criminal Law ⚿234, 419.

Westlaw Key Number Searches: 110k234; 110k419.
C.J.S. Criminal Law §§ 348, 856.

Rules of Evid., Rule **1102,** UT R REV Rule **1102**

Current with amendments received through October 1, 2005

END OF DOCUMENT

Utah Rules of Civil Procedure, Rule **40**

C
West's Utah Court Rules Annotated Currentness
State Court Rules
Utah Rules of Civil Procedure (Refs & Annos)
Part VI. Trials

→**RULE 40**. ASSIGNMENT OF CASES FOR TRIAL; CONTINUANCE

(a) Order and Precedence. The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts may deem expedient. Precedence shall be given to actions entitled thereto by statute.

(b) Postponement of the Trial. Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

(c) Taking Testimony of Witnesses Present. If required by the adverse party, the court shall, as a condition to such postponement, proceed to have the testimony of any witness present taken, in the same manner as if at the trial; and the testimony so taken may be read on the trial with the same effect, and subject to the same objections that may be made with respect to a deposition under the provisions of Rule 32(c)(3)(A) and (B).

[Amended effective April 29, 1999.]

LIBRARY REFERENCES

Pretrial Procedure ⚿711 to 726.
Trial ⚿6, 9.
Westlaw Key Number Searches: 388k6; 388k9; 307Ak711 to 307Ak726.
C.J.S. Continuances §§ 2 to 133.
C.J.S. Trial §§ 1, 31 to 38, 60 to 62, 79.

RESEARCH REFERENCES

Treatises and Practice Aids

Trial Handbook for Utah Lawyers §§ 2:1 and 2:2, Continuances.

NOTES OF DECISIONS